

## THE OFFICE OF CONTRACTING AND PROCUREMENT

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### NOTICE OF EMERGENCY RULEMAKING

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The Chief Procurement Officer of the District of Columbia pursuant to authority granted to the Mayor by Section 204 of the District of Columbia Procurement Practices Act of 1985 (“PPA”), effective February 21, 1986 (D.C. Law 6-85; D.C. Official Code § 2-302.04 (2001)), Title II of the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 (Child and Youth Act or Act), effective April 13, 2005 (D. C. Law 15-353), Mayor’s Order 2002-207 (dated December 18, 2002), and Mayor’s Order 2005-73 (dated May 5, 2005) (Mayor’s Order), hereby gives notice of the adoption of the following emergency rules to add new Chapter 5 of Title 27 of the District of Columbia Municipal Regulations (Contracts and Procurement). The rulemaking is intended to implement section 211 of Title II of the Child and Youth Act authorizing the Mayor to issue rules requiring that criminal background and traffic records checks be obtained for individuals and unsupervised volunteers employed by, and applicants for employment with, any private entity that contracts with the District to provide direct services to children or youth as those terms are defined in the Child and Youth Act.

The Mayor’s Order delegates to the Chief Procurement Officer the authority vested in the Mayor in section 211 of the Act to issue rules governing the criminal background check and the traffic record check requirements in sections 203 and 204(b)(2) of the Act, for persons and private agencies being considered for contractual work providing direct services to children and youth in District covered agencies.

The rules were approved as emergency and proposed rules on May 5, 2005, and published in a Notice of Emergency and Proposed Rulemaking in the *D. C. Register* on May 20, 2005, at 52 DCR 4782. No changes have been made to the rules as proposed, except for an Errata notice assigning Chapter 5 and deleting Chapter 4 and conforming the numbering of sections and subsections to the change. A Notice of Final Rulemaking was submitted to the Office of the Mayor on July 11, 2005 with a transmittal to the Council of the District of Columbia requesting its approval pursuant to section 205(b) of the PPA (D. C. Official Code § 2-302.05(b) (2001)).

The emergency rules will expire on September 2, 2005. Action was therefore taken on August 22, 2005, to adopt the following emergency rules effective on that date. Emergency rulemaking action, pursuant to § 6(c) of the District of Columbia Administrative Procedure Act, effective October 21, 1968 (82 Stat. 1206; D. C. Official Code § 2-505(c) (2001)), is justified by the need to ensure preservation of the welfare of children and youth being served by contractors with the District of Columbia agencies enumerated in the Mayor’s Order.

## **CHAPTER 5**

### **CRIMINAL BACKGROUND CHECKS FOR DISTRICT GOVERNMENT CONTRACTORS THAT PROVIDE DIRECT SERVICES TO CHILDREN AND YOUTH**

*A new Chapter 5 is added to Title 27 to read as follows:*

#### **500 GENERAL PROVISIONS**

- 500.1** The Mayor is authorized to obtain criminal history records maintained by the Federal Bureau of Investigation and the Metropolitan Police Department, or secured by them through the National Criminal Information Center, and traffic records maintained by the Department of Motor Vehicles, to investigate persons applying for employment, in either a compensated or a volunteer position with, or current employees and volunteers of, private agencies that contract with the District of Columbia government as a covered child or youth services provider, as defined in section 202(3) of the Child and Youth Act and section 599 of this chapter, and in accordance with the list of agencies enumerated in Mayor's Order 2005-73, effective May 5, 2005. .
- 500.2** The Chief, Metropolitan Police Department (or his or her designee), shall be responsible for conducting criminal background checks under the Act, including fingerprinting, for private District agencies that are subject to the Act. In order to fulfill these functions, District agencies shall, by Memorandum of Agreement with the Metropolitan Police Department, agree to allocate resources to the Metropolitan Police Department to cover the costs of performing the criminal background checks required under the Act. The resources provided by each District agency shall be proportional to the number of its contract employees required to obtain a criminal background check.
- 500.3** Section 204(a) of the Child and Youth Act authorizes the Mayor to conduct traffic record checks of applicants for employment and employees, for either a compensated or an unsupervised volunteer position with any covered child or youth services contractor, when those individuals would be required to drive motor vehicles to transport children or youth in the course of performing their duties. Traffic record checks shall be conducted using the database maintained by the Department of Motor Vehicles. In order to fulfill these functions, District agencies shall, by Memorandum of Agreement with the Department of Motor Vehicles, agree to allocate resources to the Department of Motor Vehicles to cover the costs of performing the traffic record checks required under the Act. The resources provided by each District agency shall be proportional to the number of its contract employees required to obtain a traffic record check.
- 500.4** District contractors who provide direct services to children and youth who are subject to the Act shall pay for the costs for the criminal background checks and traffic record checks required under the Act.

- 500.5** Except as otherwise required by a contract, each employee or unsupervised volunteer occupying a covered position as defined in section 599 of this chapter shall be required to submit to periodic criminal background checks while employed by, or volunteering at, a private agency that provides direct services to children and youth pursuant to a contract with the District of Columbia government.
- 500.6** Before any applicant for employment, in either a compensated or a volunteer position, with a private agency that provides direct services to children and youth pursuant to a contract with the District of Columbia government, may be offered a position, the private agency shall inform the applicant that a criminal background check must be conducted on him or her, and shall request the Metropolitan Police Department to conduct the background check.
- 500.7** Pursuant to section 204 (b) of the Act, private agencies that contract with the District of Columbia government shall request the Department of Motor Vehicles to conduct traffic record checks on the agencies' employees, unsupervised volunteers and applicants for employment who would be required to drive a motor vehicle to transport children in the course of performing his or her duties.
- 500.8** A contractor subject to the Act shall not make a final offer of appointment to, nor shall it assign a current employee to, a compensated or unsupervised volunteer position for which a criminal background check or traffic record check is required until after the criminal background check or traffic record check, or both, have been conducted on the appointee and a determination made that the appointee meets the requirements of the Act.

## **501 NOTICE TO CONTRACTOR**

- 501.1** The Chief Procurement Officer, in accordance with Mayor's Order 2004-166 and section 206(a) of the Act, shall publish in the *D. C. Register* a notice that requires District agencies to submit the names of private agencies that contract to provide direct services to children and youth and whose employees and unsupervised volunteers should be subject to the criminal background check requirements of this chapter, together with the positions the agency has designated as subject to such requirements, within 45 days from the date of publication of the notice.
- 501.2** The Chief Procurement Officer, following review of the information on private agencies submitted pursuant to section 501.1, shall determine what private agencies that provide direct services to children and youth are required to apply for criminal background checks, and shall publish in the *D.C. Register* a notice that applicants for employment with, and employees and unsupervised volunteers of, such clearly identified private agencies are required to apply for criminal background checks within 45 days from the date of publication of the

notice, or from the date of contract award, whichever is sooner. The notice shall inform agencies subject to the requirements of this chapter of the location of the office in which applications for criminal background checks are to be made.

**501.3** In accordance with section 206(b) of the Act, each District agency shall submit to the Chief Procurement Officer an updated list of the positions with private entities that are subject to the criminal background check requirements of this chapter no later than December 1 of each year. The Chief Procurement Officer shall publish the updated list of positions annually in the *D. C. Register*.

**501.4** Following publication of the notice required by section 501.2 or award of a contract to an “agency that provides direct services to children and youth”, as identified by the Chief Procurement Officer pursuant to section 501.2, the contracting officer shall notify the contractor that it must conform to the procedures in sections 501.5 and 501.6. The contracting officer’s notice to the contractor shall include a procedure for the contractor to challenge the determination that it is required to comply with the requirements of this chapter.

**501.5** Prior to a criminal background check being conducted, the contractor shall in writing inform each applicant, employee or unsupervised volunteer subject to the check where and when to report for fingerprinting, and provide each applicant, employee, or unsupervised volunteer with a form or forms to be utilized for the following purposes:

- (a) To authorize the Metropolitan Police Department or other entity, as appropriate, to conduct the criminal background check and confirm that the applicant, employee, or unsupervised volunteer has been informed that the contractor is authorized and required to conduct a criminal background check;
- (b) To affirm that the applicant, employee, or unsupervised volunteer has not been convicted of a crime, has not pleaded nolo contendere, is not on probation before judgment or placement of a case upon a stet docket, and has not been found not guilty by reason of insanity for any sexual offenses or intra-family offenses in the District of Columbia or their equivalent in any other State or territory of the United States, for any of the following offenses or their equivalent in another State or territory:
  - (1) Murder, attempted murder, manslaughter or arson;
  - (2) Assault, battery, assault and battery, assault with a dangerous weapon, mayhem, or threats to do bodily harm;
  - (3) Burglary;
  - (4) Robbery;
  - (5) Kidnapping;
  - (6) Theft, fraud, forgery, extortion, or blackmail;

- (7) Illegal use or possession of a firearm;
- (8) Trespass or injury to property;
- (9) Sexual offenses, including indecent exposure; promoting, procuring, compelling, soliciting, or engaging in prostitution; corrupting minors (sexual relations with children); molesting; voyeurism; committing sex acts in public; incest; rape; sexual assault; sexual battery; or sexual abuse;
- (10) Child abuse or cruelty to children; or
- (11) Unlawful distribution or possession of, or possession with intent to distribute, a controlled substance.

- (c) To acknowledge that the applicant, employee, or unsupervised volunteer has been notified of his or her right to obtain a copy of the criminal background check report and to challenge the accuracy and completeness of the report;
- (d) To acknowledge that the employer may choose to deny the applicant employment, assignment to, or an unsupervised volunteer position for which a criminal background check is required based on the outcome of the criminal background check;
- (e) To provide any additional information that is required, such as name, social security number, date of birth, and gender; and
- (f) To inform the applicant or employee that a false statement on the form or forms may subject them to criminal penalties, in accordance with section 505.

**501.6** The contractor shall direct the applicant or employee to complete the form or forms specified in section 501.5 and report to the designated location to be fingerprinted.

**501.7** The Chief, Metropolitan Police Department, shall conduct a criminal background check once the applicant or employee has provided the form required by section 501.5(a) as well as a copy of the notification that the applicant or employee is required to obtain a criminal background check.

**501.8** District agencies may establish in a contract offenses other than those listed in subsection 501.5(b), to be considered in determining eligibility of applicants or employees for covered positions. The contractor shall follow any additional procedures specified in the contract.

## **502 CONTRACTOR EVALUATION OF CRIMINAL BACKGROUND AND TRAFFIC RECORD CHECK**

**502.1** The contractor shall consider a variety of factors in determining an employee's or

applicant's suitability for employment based on a criminal background check conducted pursuant to this section, but shall not consider arrest records and juvenile records. Possession of one (1) or more of the following criminal background events may make the applicant or employee ineligible for employment or voluntary service:

- (a) A felony conviction; or
- (b) A serious misdemeanor conviction.

**502.2** Except as provided in 502.3(c) of this section, the Contractor shall closely consider the following variables and evaluate each criminal background check report on a case-by-case basis to determine if an applicant or employee subject to a criminal background check shall be ineligible for employment or voluntary service:

- (a) The recency of any conviction;
- (b) The age of the applicant or employee at the time of any conviction;
- (c) Any false statements made by the applicant or employee concerning the form or forms described in section 501.5 of this section, or the discovery of any intentional false statements of material fact or deception or fraud in applying for employment, compensated or not, that would provide a basis for disqualification; and
- (d) The absence or presence of rehabilitation or efforts toward rehabilitation.

**502.3** The following provisions shall apply to criminal background checks of applicants for employment and unsupervised volunteer positions:

- (a) Based on the outcome of the criminal background check, the contractor shall determine whether to make or deny a final offer of appointment to the applicant.
- (b) Notwithstanding the considerations specified in sections 502.1 and 502.2, District agencies may establish alternative evaluation processes through contracts.
- (c) Notwithstanding the factors and variables specified in sections 502.1 and 502.2, an applicant who has been convicted of a crime against children or youth shall be ineligible for appointment to a position that provides direct services to children and youth.

- (d) If the contractor decides to deny an applicant an offer of employment, the contractor shall provide the applicant a written notification of the decision, with a copy to the Contracting Officer's Technical Representative (COTR). In the written notification contractor shall inform the applicant of his or her right, within ten (10) days of receiving the written notification, to obtain a copy of the criminal background check report and to challenge the accuracy and completeness of the report, in writing.
- (e) Upon receiving a challenge to a criminal background check report, the appropriate administrative officer of the contractor shall promptly make a determination on the case and inform the appointee of the decision, in writing, with a copy to the personnel authority and the COTR.

**502.4** The following provisions shall apply to criminal background checks of employees and unsupervised volunteers:

- (a) Contractors subject to the provisions of the Act and this chapter shall conduct periodic criminal background checks for current employees and unsupervised volunteers.
- (b) An employee or unsupervised volunteer who fails a periodic criminal background check may be subject to administrative action up to and including, but not limited to, reassignment and termination. In determining what action is to be taken, the contractor shall consider the factors set forth in sections 502.1 and 502.2 as well as any other similar factors, except that a criminal background check that sets forth a conviction for a crime against children or youth shall result in termination.
- (c) At the contractor's discretion, an employee or unsupervised volunteer who fails a periodic criminal background check may be reassigned to a non-covered position.
- (d) If the contractor decides to take administrative action against an employee or unsupervised volunteer, the contractor shall provide the employee or unsupervised volunteer a written notification of the decision, with a copy to the COTR. In the written notification the contractor shall inform the employee or unsupervised volunteer of his or her right, within ten (10) days of receiving the written notification, to obtain a copy of the criminal background check report and to challenge the accuracy and completeness of the report, in writing.
- (e) Upon receiving a challenge to a criminal background check

report, the appropriate administrative officer of the contractor shall promptly make a determination on the case and inform the employee or unsupervised volunteer of the decision, in writing, with a copy to the personnel authority and the COTR.

**502.5** For applicants or employees whose official duties would include driving a motor vehicle to transport children or youth, the contractor will judge records of traffic infractions on an individual basis. A pattern of disregard for traffic regulations, the frequency of traffic violations, or one or more convictions for driving under the influence of intoxicants or drugs may result in a determination that an applicant or employee is ineligible for employment or unsupervised voluntary service in a covered position.

**502.6** District agencies may establish more stringent driving record requirements through a contract.

### **503 ACTION AGAINST CONTRACTOR**

**503.1** The Chief Procurement Officer may take corrective or adverse action, in accordance with Section 8, "Default" of the Standard Contract Provisions for use with District of Columbia Supplies and Services Contracts, that are made a part of the contract, against any covered child or youth services contractor who is found to have violated the provisions of this chapter.

### **504 CONFIDENTIALITY**

**504.1** Criminal background check reports obtained under this section shall be confidential and are for the exclusive use of making employment-related determinations under this chapter. Contractors subject to this chapter shall not release or otherwise disclose the reports to any person, except when:

- (a) Required as one component of an application for employment with the contractor;
- (b) Requested by the Chief Procurement Officer or his or her designee during an official inspection or investigation;
- (c) Ordered by a court;
- (d) Authorized by the written consent of the person being investigated;
- (e) Otherwise required by the contract; or
- (f) Utilized for a corrective or adverse action in a personnel proceeding, including but not limited to, an administrative action under section 502.4(b).

**504.2** An individual who discloses confidential information in violation of this section shall be guilty of a criminal offense and, upon conviction, shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both.

**504.3** Prosecutions for violations of this title shall be brought in the name of the District upon information by the Attorney General.

**505 PENALTY FOR PROVIDING FALSE INFORMATION**

**505.1** An applicant for employment or a volunteer position with a private agency covered by this chapter who provides false information in the course of applying for the position shall be subject to prosecution pursuant to section 404 of the District of Columbia Theft and White Collar Crimes Act of 1982 (D. C. Law 4-164; D. C. Official Code § 22-2405(2001)), and, upon conviction, shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both.

**506 PENALTY FOR NON-COMPLIANCE WITH CRIMINAL BACKGROUND REQUIREMENTS**

**506.1** The penalty for non-compliance with the terms of the Act or these rules shall be specified in the contract.

**599 DEFINITIONS**

**599.1** When used in this chapter, the following terms have the meaning ascribed:

**Act (or Child and Youth Act)** – the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 (D. C. Law 15-353, effective April 13, 2005).

**Agency that provides direct services to children and youth** – any public or private District agency that provides to children and youth, or for the benefit of children and youth, services that affect the health, safety, and welfare of children and youth, including individual and group counseling, therapy, case management, supervision or mentoring.

In accordance with Mayor’s Order No. 2005-73, the following public agencies meet this definition and shall be subject to the criminal background check and traffic record check provisions of the Act and this chapter for purposes of their own activities, and the activities of private agencies who meet the definition of “an agency that provides direct services to children and youth,” as set forth in the Act, and who are parties to contracts entered into on behalf of the following agencies by the Office of Contracting and Procurement:

Department of Human Services  
Department of Health  
Department of Parks and Recreation  
Fire and Emergency Medical Services Department

Metropolitan Police Department  
State Education Office of the Executive Office of the Mayor  
Department of Mental Health  
Child and Family Services Agency  
Department of Youth Rehabilitation Services

**Applicant** – an individual who has filed a written application for employment with a private District agency that provides direct services to children and youth or an individual who has made an affirmative effort through a written application or a verbal request to serve in a volunteer position with a public or private District agency that provides direct services to children and youth.

**Children** – individuals twelve (12) years of age and under.

**Contracting Officer's Technical Representative** – The agency employee responsible for general administration and day-to-day monitoring and supervision of the contract, and for advising the Contracting Officer as to the contractor's compliance or noncompliance with the contract.

**Covered position** – a position, compensated or voluntary, in a private District agency that provides direct services to children and youth, with duties and responsibilities that would require the employee or volunteer to provide direct services that affect the health, safety, and welfare of children and youth or services for the benefit of children and youth.

**Criminal background check** – the investigation of a person's criminal history through the record systems of the Federal Bureau of Investigation and the District of Columbia Metropolitan Police Department.

**Employee** – an individual who provides direct services to children and youth and is employed on a full-time, part-time, temporary or contractual basis by a private District agency that provides direct services to children and youth.

**Volunteer** – an individual who works, in either a supervised or unsupervised capacity, without any monetary or other financial compensation for a private District agency that provides direct services to children and youth.

**Youth** – individuals between thirteen (13) and seventeen (17) years of age, inclusive.